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IN THE

Supreme Court of the United States

October Term, 1964

No. 557

GRANT THORN, GENEVIEVE U. THORN; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Tar Products Corporation; GRANT THORN, GENEVIEVE U. THORN and SAMUEL UHLFELDER, Directors in Trust for Stockholders, Members and Creditors of Eastern Road Materials Corporation,

Appellants

vs.

HARRISBURG TRUST COMPANY,

Appellee

Appeal from The United States Circuit Court of Appeals for the Third Circuit.

APPELLEE'S MOTION TO DISMISS FOR WANT OF JURISDICTION

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OPINIONS BELOW

The appeal of Grant Thorn, et al., is taken from a decision of the United States Court of Appeals for the Third Circuit, rendered April 8, 1964. The case was docketed at No. 14,568. Both the Opinion and Order of the Court of Appeals are appended to the Jurisdictional Statement submitted October 2, 1964 by Appellant.

The appeal to the Court of Appeals was taken from a decision of the United States District Court for the Middle District of Pennsylvania, dated June 26, 1963. The case was docketed in the District Court at Civil Action No. 6420. The District Court's Memorandum and Order are reproduced in the appendix to Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

The tortured course of this litigation may be summarized as follows. Appellants first filed suit in 1955 and did nothing for four years. Shortly before this suit was dismissed for lack of prosecution and a few days prior to the running of the applicable statute of limitations in 1958, they filed another suit. Again, no action was taken until 1961.

In 1961 and 1962, Mr. Thorn refused to appear for depositions. Although ill health was subsequently alleged as the reason, no proof was offered. Nor was a motion filed seeking relief from his obligation to appear. In April, 1962, the suit was dismissed as to Grant Thorn for willful failure to appear, and, as to him and the other appellants, for failure to prosecute. The Court of Appeals affirmed.

In 1963, Appellants moved the District Court to set aside its dismissal order under FRCP 60(b). That Court refused to do so, giving three reasons:

(1) Appellants did not show that their failure to justify their conduct was due either to inadvertence or excusable neglect;

(2) Appellants' motion was not timely filed; and

(3) Appellants had not sought leave of the Court of Appeals, which had affirmed the District Court's order, before making their motion.

The heart of the District Court's reasoning was stated as follows (p. 6):

> "In view of the long history of delays; failure to appear; disregard of all the rules not only of the Court but common ordinary decency as well; the withdrawal of their local counsel, the failure to follow through with explanations for nonappearance or delay; the failure of the other plaintiffs to act if the one vocal plaintiff, Grant Thorn, was too ill to act; Thorn's failure to make a timely application for continuance; failure of any of the plaintiffs to bring to the Court's attention, before or after the hearing on April 6, 1962, the material on which they now seek to rely; the failure on April 6, 1963, to request a continuance or at least to submit affidavits subsequent thereto, to characterize plaintiffs' conduct here even as 'inexcusable neglect' is to grossly understate the facts. For this reason the motion to vacate must be denied."

The Court of Appeals affirmed on April 8, 1964. That ruling is the subject of this appeal.

MOTION TO DISMISS FOR WANT OF JURISDICTION

I. THIS APPEAL DOES NOT CONFORM TO THE SUPREME COURT RULES

Supreme Court Rule 16 authorizes a motion to dismiss where an appeal is not taken in conformity to this Court's Rules. This is the basis of the first part of Appellee's Motion To Dismiss.

Rules 10 through 18 of this Supreme Court's Rules prescribe the procedure on appeal. These Rules are brief and they are lucid. Nevertheless appellants have failed utterly to observe them.

Appellants' "Notice of Appeal" is governed by Rule 10, which requires filing in the court from which an appeal is taken. That court is the Court of Appeals of the Third Circuit. However, the Notice was inexplicably and improperly filed in the District Court for the Middle District of Pennsylvania.

Further, the Notice is totally deficient in content. It consists solely of the following request:

> "Mr. Clerk:
>
> "Kindly enter an appeal to the Supreme Court of the United States from the order dated April 8, 1964 of the United States Court of Appeals for the Third Circuit in the above matter."

There was not even an indication of who was taking the appeal!

More significantly, there was no specification of the statute under which the appeal was taken. Nor was there a designation of the portions of the record to be certified. Yet Rule 10 specifically requires a reference to the statute and a designation of the record. Finally, appellants completely ignored the requirement that the Notice contain a statement of the questions presented.

Perhaps the most serious defect was the failure to state the questions presented, the most important element of a notice. Rule 10 emphasizes the importance of this function by stating, inter alia, that "Only the questions set forth in the notice of appeal or fairly compromised therein will be considered by the court". This same principle is reiterated in Rule 15(1)(c)(2), where it is stated, that:

> "The phrasing of the questions presented need not be identical with that set forth in the notice of appeal . . . *but the jurisdictional statement may not raise additional questions of change the substance of the questions already presented.*" (Emphasis supplied.)

These are fatal errors. Rule 10 itself notes that "A failure to comply with these requirements will be a sufficient reason for dismissing the appeal." Rule 16 implements this by stating that a motion to dismiss may be based on the ground "that the appeal is not within the jurisdiction of this court, because not taken in conformity . . . to these rules."

This Court has frequently refused to consider appeals which did not conform to its Rules. In *Head v. New*

Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 83 S. Ct. 1759 (1963), the Court quoted Rule 10 and refused to consider a question which was not reserved in the notice of appeal. Again, in *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 80 S. Ct. 474 (1960), the Court excluded a question on appeal, on the ground that only issues properly raised in a jurisdictional statement could be considered. Similarly, this Court has refused to resolve issues raised on brief but not in the petition for certiorari. *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151 (1963); *Local 1976 v. N.L.R.B.*, 357 U.S. 93, 78 S. Ct. 1011 (1958); *Irvine v. California*, 347 U.S. 128, 74 S. Ct. 381 (1954); *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 60 S. Ct. 569 (1940); *General Talking P. Corp. v. Western Electric*, 304 U.S. 175, 58 S. Ct. 849 (1938).

Three deficiencies were not cured by later filings. The Jurisdictional Statement does recite, for the first time, questions presented. But, as noted, it cannot raise questions not presented by the Notice of Appeal. Nor can appellants' tardy filing of a Designation of the Record cure the Notice of Appeal by indiscriminately designating, one month too late, *everything* as certified.

The failure of Appellants to observe the Rules of this Court should not be condoned. Certainly, proper procedure is essential to the orderly administration of justice. Especially is this true where, as here, Appellants' failure is just a continuation of a pattern of disregard for orderly process, persisted in since 1955 and severely criticized by the Courts below. Accordingly, this appeal should be dismissed.

II. THIS APPEAL IS NOT IN CONFORMITY TO STATUTE

Supreme Court Rule 16(a) authorizes a motion to dismiss where an appeal is not taken in conformity to statute. This is the basis for the second part of Appellee's motion to dismiss.

It is impossible to determine from Appellants' pleadings what is the alleged statutory basis for this appeal. The Notice of Appeal indicates no basis whatsoever. The Statement of Jurisdiction (p. 1) relies solely on "26 statutes at large Chapter 517, Page 827 (1891) of the Acts of Congress of the United States."

But the only act which appears at that citation is one continued from the preceding page, dealing with the establishment of Circuit Courts of Appeal. According to Shepard's United States Citations, several portions of this Act have been repealed. The only portions which remain in the United States Code are §§ 2, 9, 10 and 11. Section 2 is incorporated in 28 U.S.C.A. §§ 1913, 604, 711, 961 and 962; §§ 9 and 10 appear in 28 U.S.C.A. §§ 604, 713 and 2106; and § 11 appears in F.R.C.P. 73 and 28 U.S.C.A. § 2107.

Reference to these provisions reveals that they deal primarily with administrative aspects of the Court functions, such as clerks, criers, and librarians. 28 U.S.C.A. § 2106 does describe the powers of appellate courts in dealing with lower court cases. And both 28 U.S.C.A. § 2107 and 73 F.R.C.P. deal with procedure on appeal

to a Court of Appeals. But neither deals with appeals to this Supreme Court.

Sections 5 and 6 of the statute cited did deal with appeals to the Supreme Court. But these have been supplemented or superseded by more recent provisions governing such appeals, as indicated by the notes accompanying sections 1252-1257 in 28 U.S.C.A. See also, e.g., *Fay v. Noia*, 372 U.S. 391, 413, 83 S. Ct. 822, 835, note 26, (1963).

The general provisions governing this Court's jurisdiction are 28 U.S.C.A. § 1251, et seq. None authorizes this appeal. Section 1251 deals with original jurisdiction only. Section 1252 allows appeals from a court decision holding an Act of Congress unconstitutional. Section 1253 involves appeals from a ruling by a three-judge court on injunctions. Section 1254(2) permits appeals where a state statute has been declared contrary to federal law. Section 1257 allows appeals from a state court in certain instances, and Section 1258 does the same with the Supreme Court of Puerto Rico.

There is, therefore, no statutory basis for this appeal. Accordingly, it should be dismissed.

III. THIS APPEAL DOES NOT RAISE SUBSTANTIAL FEDERAL QUESTIONS REQUIRING FURTHER ARGUMENT

Supreme Court Rule 16(b) and (c) provide that this Court will dismiss an appeal, and affirm the judgment

below, where the questions presented are so unsubstantial as not to warrant further argument. This is the basis of the third part of Appellee's motion to dismiss.

It is difficult to ascertain exactly what question is presented. None is mentioned in The Notice of Appeal. And the Jurisdictional Statement is so vague as to be uninformative.

Such vagueness, without more, is grounds for dismissal: *Van Stone v. Stillwell and Bierce*, 142 U.S. 128, 12 S. Ct. 181 (1891). As this Court said in *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 86, 91, 53 S. Ct. 32, 34 (1932):

> "It is essential to a proper presentation of points relied on for reversal that the statute and rules of court requiring and governing the forms of assignments of errors be complied with. Every appeal must be accompanied by an assignment of errors which shall set out separately and particularly each error asserted. The purpose is to enable the court, as well as opposing counsel, readily to perceive what points are relief on. The substitution of vague and general statement for the prescribed particularity sets the rule at naught. Phillips etc. Const. Co. v. Seymour, 91 U.S. 646, 648, 23 L. Ed. 341; Briscoe v. Dist. of Columbia, 221 U.S. 547, 549-550, 31 S. Ct. 679, 55 L. Ed. 848. And, as the rule makes for convenience and certainty in the consideration of cases, the court may, and generally it will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule, even if the opposing party raises no question, and treats it as adequate.

A reading of the Jurisdictional Statement suggests that, at best, the questions are as follows:

1. Was Grant Thorn guilty of willful failure in not appearing for the depositions requested by Appellees?

This question was thoroughly considered by both courts below. Both responded in the affirmative. That response was correct.

Mr. Thorn twice refused to appear for depositions. Although the alleged excuse was ill health, he offered no proof—*not even a doctor's affidavit*—either time. Nor was there ever a motion under F.R.C.P. 30(b) for appropriate relief. And on Appellee's motion to dismiss because of willful failure to appear, no proof of justification was offered although *both Thorn and his doctor were in court* during the argument!!

In any event, the question is not properly before this Court. It could have been raised by certiorari or appeal following the Court of Appeals' decision. Instead, Appellants chose to return to the District Court to file a motion under F.R.C.P. 60(b), which is the subject of this appeal. Thus, Appellants can not now seek review of the District Court's determination that Thorn willfully failed to appear at the depositions.

2. Should the District Court have granted relief under F.R.C.P. 60(b), vacating the dismissal of Appellants' suit, after the Court of Appeals had affirmed that dismissal?

F.R.C.P. 60(b) permits a court to "relieve a party or his legal representative from a final judgment" where the party has been guilty of "inadvertence" or "excusable

neglect". At no time have Appellants demonstrated that this was the case.

Rather, their motion merely attempted to explain Thorn's refusal to appear for the depositions. But the issue under F.R.C.P. 60(b) is not *why* Thorn failed to appear. Rather, it is why he *failed to justify that conduct* when given the opportunity to do. Certainly the opportunities were there: at the time of the depositions, by motion under Rule 30 or even as late as the hearing on the motion under F.R.C.P. 60(b). But never did Thorn explain his failure to produce evidence excusing his conduct.

Thus, Appellants really can say only that they chose to ignore federal procedure and now wish to escape the consequences. However, such conduct was properly grounds for dismissal of their claim: *Collins v. Wayland*, 139 F. 2d 677 (9th Circuit, 1944), cert. denied 322 U.S. 744 (1944); *Dictograph Products v. Kentworth Corporation*, 7 F.R.D. 543 (D.C.W.D. Ky., 1947); *Loosley v. Stone*, 15 F.R.D. 373 (D.C.S.D. Ill., 1954). And the mere desire to escape the consequences of their conduct is not grounds for relief under Rule 60(b). See, e.g., *Flet v. W. A. Alexander & Company*, 302 F. 2d 321 (7th Cir., 1962); *Frank v. New Amsterdam Cas. Co.*, 27 F.R.D. 258 (D.C. E.D. Pa., 1961); and *Ledwith v. Storkan*, 2 F.R.D. 539 (D.C. Neb., 1942).

Even if Thorn's failure to appear had been excusable, and even if Appellants' motion under 60(b) had attempted to show this, the motion was still properly denied as being too late. Such a motion must be made within a reasonable

time. F.R.C.P. 60(b). But appellants' delay, in waiting nearly a year, was not reasonable.

The basis of Appellants' motion existed well before the verdict of dismissal, since the excuse was Thorn's illness at the time of deposition-taking. Thus, a motion for relief under Rule 60(b) was in order following the District Court's dismissal of the action. Instead, Appellants appealed. Certainly, the motion should have been presented immediately after the Court of Appeals affirmed the lower court. Instead, Appellants delayed two months, until the very end of the permissible period, before submitting their motion.

These delays have never been explained. Nor can they be. They are part and parcel of the whole pattern of delay by Appellants in this case. They waited three years to sue, did nothing for four years, filed another (the present) suit, and did nothing until it was dismissed. Thorn failed twice to appear for depositions. Appellants filed an appeal only two days before the expiration of the appeal period, sought a continuance to file briefs and, *even then, filed briefs two days late.* And then they moved under Rule 60(b) in the District Court two days before the end of the year accorded them for such motions —and two months after the Court of Appeals denied their appeal.

Such delay is incredible and unjustified. Nothing in the record warrants a contrary finding. Certainly the two courts below could reasonably find that the delay in filing the motion under 60(b) was unreasonable. See, e.g., *Mayfair Extension, Inc. v. Warren E. Magee*, 241 F. 2d 453 (1957), and *In Petition of Oskar Tiedemann and Company*, 183 F. Supp. 129 (D.C., Del., 1960).

In any event, the motion under Rule 60(b), in addition to its other defects, was not properly before the District Court. This was because Appellants did not seek leave of the Court of Appeals before asking the District Court to set aside the verdict affirmed by the higher court. Therefore, the District Court properly denied the motion: 7 Moore's Federal Practice, Paragraph 60.30(2), p. 339, *Butcher and Sherrerd v. Welsh*, 206 F. 2d 259 (3rd Cir., 1953).

Both Questions 1 and 2 have been answered many times by the federal courts. Neither of the courts below had any difficulty in resolving them. Certainly, they do not present the substantial issues which are appropriate for resolution by this Court.

IV. THIS APPEAL RAISES A QUESTION NOT PROPERLY BEFORE THIS COURT BECAUSE APPELLANTS DID NOT PRESENT IT TO THE COURT BELOW

Supreme Court Rule 16(b) authorizes a motion to dismiss where an appeal presents questions "not timely or properly raised". Such questions include those raised for the first time in the Supreme Court. This is the basis for the fourth part of Appellee's motion to dismiss.

The question involved is not clearly articulated by Appellants' Jurisdictional Statement. However, it is suggested at pp. 5-6 and may fairly be set forth as follows:

> *"Can the misconduct of one plaintiff subject the others to sanctions?"*

This question was never raised in either of the courts below. Certainly, it is not dealt with in any of their opinions. Nor was it argued in Appellants' briefs.

The question has been present throughout the case. Many opportunities have existed in this protracted litigation to raise it: at the hearing on dismissal, on the first appeal, on the motion to vacate under Rule 60(b), and on the second appeal which is now brought to this Court. Appellants may not now raise it, for the first time, in this Court: *Federal Trade Commission v. Travelers Health Association*, 362 U.S. 293, 80 S. Ct. 717 (1960); *Lawn v. United States*, 355 U.S. 339, 78 S. Ct. 311 (1958); *Ellis v. Dixon*, 349 U.S. 458, 75 S. Ct. 850 (1955); *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 74 S. Ct. 505 (1954).

Further, the question is not so substantial as to require this court's attention. Grant Thorn was clearly the spokesman for Appellants. It was ostensibly his property that was involved. In reality, there was but one plaintiff here and he, quite properly, is bound by his own actions.

If the contrary is assumed, then the other two Appellants should have acted individually and independently. Instead, *for nearly a decade* they did nothing. Their failure to act was their choice and they must suffer the consequences. The District Court dismissed this action as to them for failure to prosecute, an action clearly warranted. Appellants never questioned, by appeal or otherwise, the propriety of this ruling.

They may not do so now.

CONCLUSION

This litigation has dragged on for years. All the delays have been caused by Appellants' indolence and errors. The courts below clearly recognize this and took the proper action: dismissal and a refusal to vacate that dismissal.

This Court should not now condone Appellants' dilatory actions. Nor should it waste its valuable time on unsubstantial questions or questions raised now—after years of opportunity—for the first time. Particularly is this so when there is no statutory basis for this appeal.

Respectfully submitted,

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